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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JOSEPH BURCH,

Petitioner,

v.

PHILIP MORRIS USA, *et. al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

JOSEPH V. BURCH, *Pro se*
3311 Rillet Court
Charlotte, NC 28269
(704) 509-2080

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

As matter of United States law, is it justifiable to be:

1. discriminated, harassed, subjected to a hostile work environment, ADA violated, retaliated against, wrongfully terminated and breached of contract based on race, pertaining to Title VII civil rights laws?

2. denied, as an union member, the exhaustion of due process and administrative remedies from a grievance proceeding based on an unlawful employment waiver?

3. denied, by falsification, an investigation and reinvestigation by a local United States Equal Employment Opportunity Commission (EEOC) to enforce pro se's due process rights and civil rights under Title VII laws against Philip Morris?

4. awarded summary judgment by the United States District Court for the Middle District of North Carolina (District Court I or District Court) based on adverse parties, obstruction of justice, and false and misleading information in order to be granted and maintain such award while also violating pro se's due process rights?

5. denied, by the United States District Court for the Middle District of North Carolina (District Court II or District Court), a request to rescind/appeal such summary judgment, substitute counsel, and an investigation of the respondents in this action based on number 4., above? Therefore;

6. awarded dismissal of breach of contract and sanctions based on, number 4., above by District Court II in June 2005 and the United States Court of Appeals for the Fourth Circuit (Court of Appeals) in June 2006?

7. denied review of Rule 60 (b)(3) of the Federal Rules of Civil Procedures by the lower courts as having jurisdiction in this matter?

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[x] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

1. The International Association of Machinist and Aerospace Workers, Local Lodge 108, c/o Legal Department, 9000 Machinists Place, Upper Marlboro, Maryland 20772-2687. (301) 967-4500
   (union)

2. The United States Equal Employment Opportunity Commission, Charlotte District Office, c/o Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Ave., N.W., Washington, D.C. 20530-0001. (202) 514-2201
   (EEOC)

3. Mr. Roger W. Rizk, c/o TED A. GREVE & ASSOCIATES, P.A., 1201 North Tryon Street, Charlotte, North Carolina 28206 (last known employer, contact). (704) 332-2323
   (Mr. Rizk)

4. Mr. Wood W. Lay, HUNTON & WILLIAMS L.L.P., Bank of America Plaza, Suite 3500, 101 South Tyron Street, Charlotte, North Carolina 28280.
   (704) 378-4753
   (Mr. Lay)

CORPORATE DISCLOSURE STATEMENT

Petitioner pro se, Joseph Burch is not parent or publicly held company or share holder owning 10% or more of the corporation's (Philip Morris USA's) stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner pro se, Joseph Burch, respectfully prays that a writ of certiorari issue to review the judgments of the Fourth Circuit in the cases below.

OPINIONS BELOW

The Fourth Circuit issued two opinions concerning Mr. Burch's pro se appeal to rescind his Title VII based claims and his breach of contract claim, which appears at Appendix A and B. Appendix B is unpublished.

The District Court issued five opinions of Mr. Burch's pro se appeal to rescind his Title VII claims and his breach of contract claim, which appears at Appendix C, D, E, F, G.

The District Court's recommendation of Mr. Burch's, as Plaintiff, Title VII claims and a breach of contract opinion appear at Appendix H. Appendix G and H was published on the District Court's internet website and are copies from its December 2004 website.

JURISDICTION

Jurisdiction over Mr. Burch's Title VII claims are conferred by 42 U.S.C. §2000e-5(f)(3), 42 U.S.C. § 1981.

Jurisdiction over his ADA claim is conferred by Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et. seq.*

Jurisdiction over his breach of contract claim is conferred by § 301 of the Labor Management Relations Act, 29 U.S.C. § 185.

The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In relevant part, the due process clause of the Fourteenth Amendment to the United States Constitution states: No State shall * * * deprive any person of life, liberty, or property, without due process of law * * *. Also, in summation, the Fourteenth Amendment protects a public employee's right to a property interest in employment.

STATEMENT OF THE CASE

PHILIP MORRIS

Petitioner pro se, Joseph Burch, pro se, was employed as a Maintenance Technician by Philip Morris from late 1996 to late 2001. About the same initial time period, early 1997, pro se was systemically and serially discriminated, harassed, and subjected to a hostile work environment, based on his race,

African American.[1] Lower management (Supervisors) and similarly situated white coworkers performed these acts that ranged from: being yelled at repeatedly, for no reason; repeatedly sent to perform service calls out of rotation; was not relieved of service calls to receive his, in violation, extended breaks and lunch breaks; repeated counseling, for taking such extended breaks and being out of his work area; sent to relieve a white coworker's service call so the he may take his, in violation, extended break; was not signed-up for required training to perform service calls. All, with no relief from management or the union.

To: pro se receiving race based derogatory comments and disparate treatment from such white coworkers, including, not responding to service calls and taking such extended breaks, with no relief from management or the union. Therefore, pro se repeatedly, asked to be transferred out of his work area, again, with no relief from management or the union.[2] Which, repeatedly, contributed to pro se being out of his work area because of such treatments.

Throughout 2001, unlike similarly situated white coworkers, pro se received the same disparate treatment, based on his race, handicap and continuing opposition of such treatment, from upper management (including, Human Resources) and lower management.[3] Only, to be retaliated against for, accordingly, filing claims of such treatments, and as a result, no relief from the union.[4]

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[1] Civil Rights Act of 1964 (42 U.S.C. §2000 et. seq.), 42 U.S.C. § 1981.

[2] *Woods v. Graphic Communications*, 925 F.2d 1195, 1200 (9th Cir. 1991).

[3] Americans with Disabilities Act of 1990 (ADA).

[4] *EEOC v. Foster Wheeler Constructors, Inc.*, No. 98C 1601, 1999 WL 507191 (N.D. Ill. July 6, 1999).

Pro se was *only* and officially terminated for walking off the job, whereas a similarly situated white and another co-worker *only* received minor suspensions, for walking off the job. Yet, two employees brought deadly weapons upon Philip Morris's property and, also, received minor suspensions. Mr. Charles T. Walker officially terminated pro se and admitted knowing other employees were leaving the property without permission (walking off the job), therefore, also knowing other employees were wearing alleged "unauthorized stickers" on all three shifts. As a result, he terminated pro se on account of his race and retaliated against him on account of opposing such disparate treatment.[5] Nevertheless, Mr. Walker and other upper management were later reassigned themselves.

Ultimately, the only relief pro se received from upper management and the union was in the form of a breach of contract by denying the exhaustion of pro se's (collective bargaining) administrative remedies, therefore, his due process rights.[6] Also, from the United States District Court—Western District of Kentucky, in *Hodges Somerville v. Philip Morris, Inc.*, 3:96CV-623-S. *Somerville* was not denied the exhaustion of his (collective bargaining) administrative remedies, even "after using abusive language towards" and twice threatened his supervisor.

Whereas, after four plus years, pro se, rotated his equally normal violated overtime breaks, which included allegedly

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[5] *Burlington Northern & Santa Fe Railway Co. v. Sheila White*, No. 05-259, 548 U.S. ___ (2006).

[6] *Vaca v. Snipes*, 386 U.S. 171, 186, 190 (1967), *DelCostello v. Int'l Bhd. Of Teamsters*, 462 U.S. 151, 164-65 (1983), *Ash v. UPS, Inc.*, 800 F.2d 409, 411 (4th Cir. 1986), *Thompson v. Aluminum Co. of Americia*, 276 F.3d 651, 656-57 (4th Cir. 2002); *Amburgey v. Consolidation Coal Co.*, 923 F.2d 27, 29 (4th Cir. 1991); Section 301 of the Labor Management Relations Act.

"walking off the job" and accordingly opposing repeated disparate treatment.

At that time, Philip Morris' continued to violate pro se's civil rights, utilizing a "Last Chance Agreement" employment wavier even after pro se's repeatedly notified the union that such agreement is unlawful in pro se's case.[7]

EEOC

Shortly after pro se refused to sign the wavier, he attempted to file a complaint with the local EEOC. During his initial visit (EEOC I) then claimant, arrived with documented racial motivated events that were bestowed upon him from 1997 to, then, the present. Including, other supporting documents, *e.g.*, Philip Morris' "Last Chance Agreement". The assistant investigator, after awhile, appeared to be in a hurry to end the interview, as it ended shortly thereafter. Before it ended, the assistant basically told pro se that there would be another investigation to address my remaining claims against Philip Morris.

However, the next morning the assistant had closed pro se's file and mailed a right-to-sue letter. Notwithstanding after contacting EEOC I, by telephone and in writing, it was determined that EEOC I would be and was rescinded. During those contacts, in April 2002, pro se mistakenly contacted the National Labor Relations Board concerning his wrongful termination and the "Last Chance Agreement".

Moreover, pro se now addresses, in pertinent part, the false and misleading information in Appendix I (EEOC II) and refutes any and all derogatory statements towards and about pro se: As can be seen, the first paragraph on page 28a contradicts 6-11-02 and 6-14-02 on page 26a which includes

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[7] *John O. Adams v. Philip Morris*, 1995 FED App. 0309P (6th Cir.); *EEOC NOTICE* Number 915.002 Date 4/10/97; *EEOC NOTICE* Number 915.002 Date July 10, 1997.

a series of other contradicting letters. Notwithstanding, at about the relevant dates, "Victoria Mackey" basically stated, on her voice mail greeting, that she is unavailable on Fridays [6-14-02] and Mondays.

Next, on page 27a at 6-28-02 is, also, frivolous and without merit because pro se did not call that day and is not what he said when he did call. Further, 7-18-02 is false and misleading according to the 6-28-02 statement. Therefore, the closing statement, on page 27a, is unequivocally false and misleading. As a result, pro se's due process and civil rights were unjustly and adversely interfered with, at least twice, by the EEOC.[8]

DISTRICT COURT

District Court II's March 11, 2005 Order basically and mistakenly stated that pro se stated that there was a "conspiracy" between Mr. Rizk and Mr. Lay. At that point, Mr. Lay adopted, and has maintained, the erred statement from District Court II to the Court of Appeals with no evidentiary support. Because, District Court II initiated the word "conspiracy".

Even assuming pro se stated that there was such a conspiracy, he did not, the Supreme Court held in *Whitfield v. United States*, No. 03-1293 that "Conspiracy Does Not Require Overt Act". Notwithstanding an overt act, apparently there was a relevant conspiracy connection according to District Court II's opinion. Yet, it chose not to initiate the District Court's *Local Rule 83.11f* upon Mr. Lay (or Mr. Rizk) that includes obstruction of justice and false and misleading statements, accordingly, upon the lower courts. That began and continues from Appendix H. *United States v. Sassanelli,* 118 F.3d 495 (6th Cir. 1997). Notwithstanding

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[8] U.S. Const. amend XIV; Conspiracy to interfere with civil rights, 42 U.S.C. § 1985.

Local Rule 83.11f, on March 11, 2005, District Court II also stated it did not have the authority to order an investigation [against Mr. Lay].

District Court II again mistakenly stated, on March 11, 2005, that pro se claimed that Defendant's attorney [Mr. Lay] abused, tampered with, erased, etc. pro se's audio tapes produced in discovery. Pro se did not and would not have made such a statement because Mr. Lay received the audio tapes from Mr. Rizk. Therefore, the distinction pro se stated to District Court II, between Mr. Rizk and Mr. Lay, concerning pro se's audio tapes was "and/or". Not just or.

And, on March 11, 2005, to the best of his ability, pro se, with his family, appeared in District Court II fully prepared, with original recordings, to defend his claims against Philip Morris, Mr. Lay and the adverse parties/respondents in these cases. However, Philip Morris and Mr. Lay had received another break from District Court II. By not allowing them to respond, as of this date, to outstanding motions submitted by pro se prior to March 11, 2005. Which, in part, are the same correspondences mistakenly sent to the Supreme Court on November 17, 2005.

Mistakenly, because District Court II did not notify then Plaintiff pro se that he could appeal, neither, its breach of contract decision nor to a Court of Appeals.

District Court II also did not notify pro se of any timeliness of such decision. However, the Supreme Court then the Court of Appeals did notify pro se about an appeals process.

Moreover and instead, after continuous denial of and pro se's inability to retain substitute counsel, District Court II ordered pro se to perform a 30-day expedited discovery against Mr. Lay. A seasoned, highly educated counselor with "significant experience" and the support of his employer, Hunton & Williams, LLP.

Further, after request of more time to perform an expedited discovery, while actually seeking to retain counsel for such counsel duties, to no avail. Assuming pro se's final outcome of an expedited discovery by pro se and District Court II's likely decisions of such indigent discovery, pro se skips this issue.

At that point, prior to June 1, 2005, pro se believed all his efforts were, then, obliterated and believed that there was not going to be a June 1, 2005 court date, because of his inability to perform a 30-day expedited discovery. However, eventually did decide to reappear in District Court II.

Therefore, this time, pro se and his family was not fully prepared to defend such accusations against all parties in these cases as we were on March 11, 2005. Yet, this time, on June 1, 2005, we were not allowed to bring pro se's original recordings with him into the courthouse to defend such accusations, to the best of his ability.

Notwithstanding, Plaintiff pro se had already submitted what he, now, believes to be expedited discovery material to District Court II from his very first and other timely motions to District Court II, which was apparently overlooked. *Haines v. Kerner,* 404 U.S. 519, 520-21, 92 S. Ct. 594, 596, 30 L. Ed. 2d 652 (1972).

Accordingly, on June 1, 2005 District Court II awarded Philip Morris, $8000 in sanctions against Plaintiff pro se. On March 11, 2005, the award was $2300.05 in court costs from District Court I. Pro se and his family asserts these decisions were, also, not justified. Moreover, pro se basically stated there were complex, concerted and elaborate acts that affected the District Court's decisions because:

1. The union and Philip Morris agreed to breach its contract with and continued to violate the civil rights of pro se. By denying and falsifying the exhaustion of his

administrative remedies, collectively, with an unlawful employment waiver.

2. Twice, the EEOC failed and falsified the investigation of pro se Title VII claims against Philip Morris, which included the unlawful employment waiver.

3. Twice, Mr. Rizk "purposely" failed to properly file of all pro se's claims and exhibit information against Philip Morris. Later, falsified all such filings with The North Carolina State Bar.[9] *See,* Title 18 § 1621; Title 18 § 1623; and Appendix J. That allowed Mr. Lay to whitewash pro se's claims. This initiated a res judicata claim to deter and eventually threaten pro se and potential counsel with sanctions, for an improper purpose.

4. Mr. Lay fraudulently suppressed and obstructed pro se's cassette recordings that were erased and altered between Mr. Lay and Mr. Rizk, with pro se's falsified EEOC documentation. [10] *See,* Title 18 § 1621; Title 18 § 1623.

5. Mr. Lay also fraudulently submitted false and misleading information to the lower courts concerning pro se's claims that contradicts such original cassette recordings and the suppressed and obstructed EEOC documentation.[10] *See,* Title 18 § 1621; Title 18 § 1623.

Therefore, Pro se believes he was justified by stating such concerted efforts, including his requested removal and

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[9] *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264 (4th Cir. 2002), *Am. Lifeguard Ass'n Inc. v. Am. Red Cross*, 21 F.3d 421, 1994 WL 144321, at *2 (4th Cir.1994) (citing *Dowell v. State Farm Fire & Cas. Auto Ins. Co.*, 993 F.2d 46, 48 (4th Cir.1993)); *see also Butler v. Sears Roebuck & Co.*, No. 101CV00643, 2003 WL 22061195, at *2 (M.D.N.C. Aug. 27, 2003); *Schultz v. Butcher*, 24 F.3d 626, 630 (4th Cir.1994); *Holland v. Virginia Lee Co.*, 188 F.R.D. 241, 249 (W.D. Va. 1999); Rule 37; Rule 60(b)(3); U.S. Const. amend XIV.

[10] *Giglio v. United States*, 405 US 105 (1972); *Brady v. Maryland*, 373 U.S. 83 (1963); *United States v. Bagley*, 473 U.S. 667 (1985); 18 U.S.C. § 1505; Title 18 § 1512(3)(b)(1)(2); U.S. Const. amend XIV.

sanctions against Mr. Lay. *See*, Appendix D; *Chambers*, 501 U.S. at 48-49. Because, if the exceptionally extraordinary circumstances at: 2, 3, 4, and 5 above, had not occurred pro se believes he would have retained forthcoming counsel. And, would not have needed counsel if at 2., above, had not occurred. Otherwise, allowing then, claimant or Plaintiff to fully present his meritorious claims against Philip Morris.

COURT OF APPEALS

As it appears, the Court of Appeals was under the false impression that District Court II had notified pro se of time limits to appeal its breach of contract decision (the lesser issue from December 2004). That, in accordance to Mr. Lay's assertion that the Court of Appeals did not have jurisdiction of District Court II's June 1, 2005 breach decision because of timeliness. Pro se asserts, in this and his previous motions, one foot lead the other. It is frivolous for Mr. Lay to even suggest pro se had no immediate intentions, under those circumstances, to timely appeal that decision had he known he could.

Unlike the Supreme Court and the Court of Appeals, District Court II did not notify pro se he could request any kind of appeal about the decision. Also, in the same vein, District Court I notified, then, Plaintiff via Mr. Risk, concerning a federal breach of contract claim. Further, as it appears, the Court of Appeals believed pro se had not timely appealed District Court II's sanctions order dated November 18, 2005, another lesser issue. *See*, Appendix B and C. Pro se had already appealed all issues and did again to the Supreme Court. It would be senseless not to, at all times, appeal what is of national importance and important to pro se.

Moreover, pro se had attempted to comply with the unjustified sanctions award, while praying the Supreme Court would, now will, accept his appeal request. Pro se asserts, for one reason, had he not attempted to comply. Philip Morris

would have issued another unjustified retaliatory request, for an improper purpose, and therefore, under those circumstances, believes such requests would have, again, been awarded. *E.g.*, Philip Morris directly inferred claims of pro se's home and property in order to receive its sanctions award.

On June 29, 2006 the Court of Appeals basically stated pro se failed to challenge the sanctions order in his informal brief on appeal. *See*, Appendix B. However, pro se did, at all times, also, challenge the sanctions award in, both of, his informal briefs on appeal. *Conley v. Gibson*, 355 U.S. 41 at 48 (1957); *Gray v. Netherland, Warden*, 117 S. Ct. 110, 137 L. Ed. 2d 234 (1996).

Consequently, on July 11, 2006, pro se notify the Court of Appeals of these errors in his request for an En banc review and Certification of Appealability, however, the Court of Appeals denied pro se's requests on August 4, 2006. *See*, Appendix A; *White v. Bloom*, 621 F.2d 276 (1980).

Finally, even assuming pro se had not timely challenged the sanctions or breach of contract decisions, he did. The crux of these lawsuits, in the second instance, originates from the illicit and fraudulent acts by the EEOC up to and upon District Court I, where summary judgement was unjustly awarded to Philip Morris. And, continued upon District Court II where, among other issues, sanctions and breach of contract decisions were unjustly in favor for Philip Morris.

REASONS FOR GRANTING THE PETITION

Petitioner pro se does not know if other adverse parties in this petition: the union and EEOC have performed the illegal acts they performed in *Burch v. Philip Morris* which ultimately was to undermine Burch's civil rights claims and due process of such claims. Therefore, undermine unsuspecting similarly situated workers and or coworkers and the civil

rights laws of this nation. Nevertheless, pro se believes precedent has been established in *Burch v. Philip Morris*. Because this request should strengthen employees' rights and seek those who are committed to protect them while hampering the criminal intent of employers. That seeks to disintegrate the established laws of this country by adversely affecting such workers with legitimate, documented complaints, like *Burch,* to unequivocally deter filing such complaints.

On the same hand Mr. Risk's criminal intent, as been established and his records from the relevant forums reflect such facts. Because, in accordance with the Florida State Bar, the North Carolina State Bar and the Supreme Court of Florida, Mr. Rizk, a former officer of the courts, has an established history of ***engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation*** not only adversely against pro se but the relevant public from state-to-state.

During, *See*, Appendix H, Mr. Rizk, among other adverse acts, "purposely" failed, on behalf of, then Plaintiff, to utilize his un-tampered cassette recordings and a former coworkers' affidavit, also, on behalf of then Plaintiff. And, in early 2005, during the North Carolina State Bar's investigation of Mr. Rizk, he then changed his view of and became in accord with Philip Morris' Last Chance Agreement. Therefore, Mr. Rizk, is the subject of Rule 60 (b)(3) in *Burch.*

Directly after the August 2003 mediation impasse, then Plaintiff asked to have his to have his property returned to him. That requested property was his production of documents.

This property, previously requested by Philip Morris, was given to Mr. Rizk, therefore, given to Mr. Lay. Including pro se's EEOC documents, originally requested by Mr. Rizk. Also included with the property, not requested by Mr. Rizk, are secret un-tampered copies of pro se's cassette recordings. On these recordings are conversations, separately and/or

collectively, between pro se and: the union, Philip Morris, the EEOC and past or present employees of Philip Morris, again, all recorded secretly.

Mr. Lay, an officer of the court, basically stated to District Court II that pro se did not, timely, ask for the return of his property (that he suppressed). Pro se never knew Mr. Lay still possessed such property. Mr. Lay also stated he did not suppress any of pro se's cassette recordings and therefore, his EEOC documents. Mr. Lay continued by stating he sought permission to preserve pro se's recordings yet has never submitted whom he sought. Mr. Lay never contacted pro se concerning that false statement nor did Mr. Rizk. Because, Mr. Rizk basically stated, I do not have any [recorded cassette] tapes, I am not aware of any tapes. Further, Mr. Lay and his assistant, both by affidavit, stated false and misleading information concerning pro se's family member.

Notwithstanding, Mr. Lay did return, in part, the production of documents after the mediation impasse. Mr. Lay returned pro se's EEOC documents, via Ted A.Greve & Associates, P.A. then, the methodically altered cassettes, both, one and a half years later—December 2004. During and beyond that time, Mr. Lay purported fraud on the lower courts including, interfering with the due process and civil rights of pro se, causing unjust judgments against him.

Pro se does not know what causes a court case to be unpublished and equally is not for him to know. Just as it is not for him to know how to perform a 30-day expedited Discovery. Therefore, it is not known how many times Philip Morris has been charged with Title IV and breach violations and the results of such violations. However, in *John O. Adams v. Philip Morris,* pro se believes *Adams* was an unsuspecting white, middle aged and former salaried worker for Philip Morris who felt Philip Morris was acting in good-faith when he signed its waiver. Notwithstanding, "economic distress", the Sixth Circuit Court of Appeals affirmed the signing.

However, in the remaining issue of the wavier, Philip Morris, also, knew the wavier was a federal violation. Pro se, repeatedly, explained that fact to the union and EEOC, concerning the violation, to no avail. Nonetheless, Philip Morris decided to further expand its agenda, above the law, in its quest to knowingly violate and disintegrate the United States civil rights and other laws. That adversely affects suspecting/unsuspecting similarly situated workers or co-workers, black or white, with legitimate, documented complaints, like *Burch.*

In fact, a present or former hourly employee believed Philip Morris acted in good- faith concerning its waiver and that pro se was acting in bad-faith by not signing it. Therefore, for all intent and purposes, all unsuspecting hourly employees believe Philip Morris was acting in good-faith, even unsuspecting salaried workers, as in *Adams.*

Not to focus on this unlawful violation alone that should be of national importance.

Not only did the Court of Appeals deny reviewing this and pro se's other timely due process merits, District Court II denied, at third instance, to hear this and pro se's other timely due process merits. Therefore, pro se believes precedent in *Burch* is, also, established here. For one reason, the claims of parties on one side these lawsuits were regarded, whereas the merits and claims of the party on the other side of these lawsuits were substantially and adversely disregarded.

Finally, even if pro se had signed the 36-month employment waiver, the longest ever initiated against any union employee up to that time, he was not a viable subject for "made whole" relief. Therefore, he could be easily labeled an African American troublemaker and that he is not.

Therefore, in light of the exceptionally extraordinary circumstances in this petition request, under Rule 10 (a) and (c) of the Supreme Court, the Supreme Court has jurisdiction to grant review of this writ of certiorari request.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JOSEPH V. BURCH, *Pro se*
3311 Rillet Court
Charlotte, NC 28269
(704) 509-2080

November 14, 2006

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Filed August 4, 2006]

No. 05-2381
CA-04-1032-1-WLO

JOSEPH BURCH,
Plaintiff-Appellant,

v.

PHILIP MORRIS USA, INCORPORATED
Defendant-Appellee.

No. 05-2382
CA-02-1124-1

JOSEPH BURCH
Plaintiff-Appellant,

v.

PHILIP MORRIS USA, INCORPORATED, a corporation
Defendant-Appellee.

On Petition for Rehearing En Banc

The appellant's petition for rehearing en banc was submitted to this Court. As no member of this Court requested a poll on the petition for rehearing en banc,

IT IS ORDERED that the petition for rehearing en banc is denied.

Entered for a panel composed of Judge Niemeyer, Judge Motz, and Judge Shedd.

For the Court,

/s/ Patricia S. Connor

CLERK

APPENDIX B

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 05-2381

JOSEPH BURCH,
Plaintiff-Appellant,

versus

PHILIP MORRIS USA, INCORPORATED,
Defendant-Appellee.

No. 05-2382

JOSEPH BURCH,
Plaintiff-Appellant,

versus

PHILIP MORRIS USA, INCORPORATED, a corporation,
Defendant-Appellee.

Appeals from the United States District Court for the Middle District of North Carolina, at Greensboro.
William L. Osteen, District Judge.
(CA-04-1032-1-WLO; CA-02-1124-1)

Submitted: May 19, 2006
Decided: June 29, 2006

Before NIEMEYER, MOTZ, and SHEDD, *Circuit Judges*.

Dismissed by unpublished per curiam opinion.

Joseph Burch, Appellant Pro Se. Wood Walter Lay, Eric Michael David Zion, Jacqueline M. Yount, HUNTON & WILLIAMS, Charlotte, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Joseph Burch filed two civil actions against Philip Morris USA, Inc. In Burch's first lawsuit, the district court adopted the magistrate judge's report and denied relief in January 2004. Burch moved to rescind the district court's order, but that motion was denied in June 2005. Burch's appeal was assigned No. 05-2382. In Burch's second action, the district court denied relief in June 2005.* Burch's appeal was assigned No. 05-2381. Both notices of appeal were filed on December 5, 2005.

Parties are accorded thirty days after the entry of the district court's final judgment or order to note an appeal, Fed. R. App. P. 4(a)(1)(A), unless the district court extends the appeal period under Fed. R. App. P. 4(a) (5), or reopens the appeal period under Fed. R. App. P. 4(a) (6). This appeal

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* The district court subsequently granted Philip Morris's motion for sanctions in September 2005. Burch moved to pay the sanctions in installments, and by order dated November 18, 2005, the district court directed Burch to provide proof of indigency by December 5, 2005, and provided that the sanction would be payable in full on December 15, 2005, if Burch did not comply. Burch never responded to the district court's November 18 order to provide an affidavit in support of his need for an installment payment plan, and therefore, pursuant to its terms, the order was reduced to a judgment for the full amount of the sanction on December 15, 2005. Burch does not challenge the sanctions order in his informal brief on appeal, so he has waived appellate review of that order. See 4th Cir. R. 34(b).

period is "mandatory and jurisdictional." *Browder v. Dir., Dep't of Corr.*, 434 U.S. 257, 264 (1978) (quoting *United States v. Robinson*, 361 U.S. 220, 229 (1960)).

Because Burch failed to file a timely notice of appeal or obtain an extension or reopening of the appeal period in either case, we dismiss the appeals. We deny his motions for appointment of counsel. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not assist in the decisional process.

DISMISSED

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

1:04CV01032

JOSEPH BURCH,

Plaintiff,

v.

PHILIP MORRIS USA INC.,

Defendant.

ORDER

The Plaintiff Joseph Burch was sanctioned by this court and ordered to pay $8000.00 to the Defendant and its attorney on or before October 1, 2005. (*See* Order filed Sept. 2, 2005.) The Plaintiff failed to make the payment but did move that he be allowed to pay the sanction at the rate of $50.00 per month. The Defendant objected to the Plaintiff's motion.

Plaintiff's motion fails to support his lack of financial resources to make the ordered payment and will be rejected by this court. Plaintiff filed a reply, which was fifteen days late. In it, Plaintiff took one more opportunity to lash out at the Defendant in a personal manner. Such comments cannot possibly help the Plaintiff.

IT IS THEREFORE ORDERED that the sanction heretofore ordered shall be paid on or before December 15, 2005, provided, however, that if the Plaintiff can show his indigency by means of a sworn affidavit which affidavit must include all personal, real or mixed property assets, in addition to all income, retirement, or other sources of income the court will consider allowing the Plaintiff to pay in monthly install-

ments which in no event would likely be less than $250.00 per month. Plaintiff shall have until but no later than December 5, 2005, to file a motion containing the necessary information to support a monthly payment. Defendant may but is not required to respond if such motion is filed.

IT IS FURTHER ORDERED that absent an order of this court authorizing monthly payments, the entire amount of $8000.00 shall be paid by December 15, 2005.

IT IS FURTHER ORDERED that failure to gain court approval of a monthly payment plan or failure to make the entire payment by December 15, 2005, whichever is appropriate, this order of sanction shall be reduced to a judgment which the Defendant may record in any appropriate county.

This the 18th day of November 2005.

/s/ William L. Osteen
WILLIAM L OSTEEN
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

1:04CV01032

JOSEPH BURCH,

Plaintiff,

v.

PHILIP MORRIS USA INC.,

Defendant.

ORDER

In this proceeding, the court has dismissed, with prejudice, the complaint on res judicata grounds. The Defendant is seeking sanctions by reason of Plaintiff's unjustified and improper conduct. In order to assess Plaintiff's conduct a review of the proceedings in this and a previous proceeding is necessary.

In 2002, Plaintiff instituted an action (Burch I) alleging wrongful discharge and various Title VII claims. That proceeding was dismissed upon summary judgment in January 2004. Costs were assessed against the Plaintiff. Ten months later, the Plaintiff filed a new but almost identical action in state court which was removed to this court by Defendant (Burch II). Plaintiff's attorney was allowed to withdraw before service had been made upon the Defendant. The court allowed Plaintiff to make service of process and 45 days to procure new counsel. Plaintiff was unable to find counsel even after an additional extension of time. Plaintiff pro se began a series of activities including a motion to stay Burch II pending impartial investigation, motion to impose sanctions

on defense attorney based upon outlandish accusations by Plaintiff, and motion for appointment of counsel based upon Plaintiff's lack of qualifications and Plaintiff's belief that "elaborate, complex and concerted illegal acts are related to" the court's decisions.

At a status conference on March 11, 2005, the court heard Plaintiff engage in a completely unsupported accusation, contending that a defense attorney had altered discovery material and engaged in unethical conduct. The court granted expedited discovery for Plaintiff to procure any evidence of defense attorney's unethical conduct. This discovery period was extended at Plaintiff's request for an additional 23 days. On June 1, 2005, a hearing was held to determine whether Plaintiff had engaged in the discovery process. He had not. The court allowed Defendant's oral motion for sanctions and granted Plaintiff 10 days after a submission by Defendant of counsel fees within which to show cause why he should not be sanctioned. The court dismissed the proceeding on res judicata grounds. Plaintiff's response objected to the imposition of any sanctions.

Wood W. Lay submitted, in response to the court's invitation, a detailed comprehensive report of his firm's legal work in properly defending his client. The court has reviewed the submission and finds it to be reasonable and proper. He has accumulated in excess of $50,000.00 in attorney fees and expenses of $499.11. Nevertheless, his client is seeking only $10,000.00 in sanctions against the Plaintiff.

The court finds that the Plaintiff has shown no just cause why he should not be sanctioned for failure to abide by the directives of the court and for attempting to relitigate the same matters which were disposed of in Burch I. The court further finds that $8,000.00 is a reasonable and appropriate sanction.

IT IS THEREFORE ORDERED that the Plaintiff Joseph Burch shall pay Eight Thousand and 00/100 Dollars ($8,000.00) to the Defendant Philip Morris USA Inc. through its attorney, Wood W. Lay, Hunton & Williams LLP, Bank of America Plaza, Suite 3500, 101 South Tryon Street, Charlotte, North Carolina 28280, on or before October 1, 2005.

This the 2nd day of September 2005.

/s/ William L. Osteen
WILLIAM L. OSTEEN
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

1:04CV01032

JOSEPH BURCH,

Plaintiff,

v.

PHILIP MORRIS USA INC.,

Defendant.

ORDER AND JUDGMENT

This matter came on for a hearing on June 1, 2005. The parties were present, with Plaintiff proceeding pro se and Defendant represented by Wood W. Lay and Nash E. Long, III and Glenn Spencer.

IT IS ORDERED that Plaintiff's Motion to Impose Sanctions Upon the Defendant and His Withdrawal as Counsel [23] is hereby DENIED as without merit.

IT IS FURTHER ORDERED that Defendant's oral motion to dismiss on *res judicata* grounds is GRANTED.

IT IS FURTHER ORDERED that this action is DISMISSED with prejudice.

IT IS FURTHER ORDERED that regarding Defendant's oral motion for sanctions, Defendant shall have ten (10) days from the date of this order to file a bill of costs. Plaintiff shall have ten (10) days from service of Defendant's bill of costs to respond to the oral motion for sanctions and/or challenge the reasonableness of Defendant's bill of costs.

This the 14th day of June 2005.

/s/ William L. Osteen
WILLIAM L. OSTEEN
United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

1:02CV01124

JOSEPH BURCH,

Plaintiff,

v.

PHILIP MORRIS USA INC.,

Defendant.

ORDER

This matter came on for a hearing on June 1, 2005. The parties were present, with Plaintiff proceeding *pro se* and Defendant represented by Wood W. Lay and Nash E. Long, III and Glenn Spencer.

IT IS ORDERED that Plaintiff's Motion to Rescind Civil Action No: 1:02CV01124 [21] and Plaintiff's Motion to Impose Sanctions Upon the Defendant and His Withdrawal as Counsel [23] are DENIED as without merit.

IT IS FURTHER ORDERED that Plaintiff's Motion to Amend Plaintiff's Motion to Rescind [24] and Defendant's Motion for Extension of Time to Respond to Plaintiff's Motion to Impose Sanctions [25] are DENIED as moot.

IT IS FURTHER ORDERED that the clerk of court shall pay to Defendant Philip Morris USA Inc., c/o Wood W. Lay, Bank of America Plaza Suite 3500, 101 S. Tryon Street, Charlotte, North Carolina 28280, the sum of $2,300.05, that sum having been paid into the court by Plaintiff to fulfill the Taxation of Costs [20] entered on May 7, 2004.

This the 14th day of June 2005.

/s/ William L. Osteen
WILLIAM L. OSTEEN
United States District Judge

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

[Filed JAN 22, 2004]

1:02CV01124

JOSEPH BURCH,

Plaintiff,

v.

PHILIP MORRIS USA, INC.,

Defendant.

JUDGMENT

On December 17, 2003, the United States Magistrate Judge's Recommendation was filed and notice was served on the parties pursuant to 28 U.S.C. § 636. No objections were filed within the time limits prescribed by Section 636.

Therefore, the Court need not make a *de novo* review and the Magistrate Judge's Recommendation is hereby adopted.

IT IS THEREFORE ORDERED AND ADJUDGED that defendant's motion for summary judgment (docket no. 12) is granted and that this action be, and the same hereby is, dismissed.

/s/ William L. Osteen
WILLIAM L. OSTEEN
United States District Judge

January 22, 2004

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

[Filed DEC 17, 2003]

1:02CV01124

JOSEPH BURCH,

Plaintiff,

v.

PHILIP MORRIS USA INC.,

Defendant.

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Plaintiff alleges he was wrongfully terminated. The matter is now before the Court on defendant's motion for summary judgment. Plaintiff opposes that motion which has been fully briefed and is now ready for decision.

Facts

The undisputed, relevant facts of the case, as shown by the evidence in the record, are as follows. Plaintiff is an African American male who was employed by defendant from 1996 until his termination on October 23, 2001. On October 19, 2001, plaintiff reported to work at defendant's "Cabarrus facility" four hours before his scheduled shift was to begin. He did this in order to work overtime prior to starting his regular shift.

Employees working overtime as plaintiff was are allowed one 15 minute break and cannot leave the facility without authorization. Although this rule was listed in defendant's

handbook and displayed from time to time in the plant where plaintiff worked, plaintiff claims that he did not receive a handbook and did not know of the rule.[1] In any event, it is undisputed that plaintiff did leave the plant in his vehicle at some point during the overtime shift. He makes no claim that he had permission to do so.

Upon returning to the plant, plaintiff was involved in an incident in which a security guard claimed that plaintiff failed to stop and properly display an identification card at the entrance to the parking lot. The guard reported this incident to plaintiff's supervisor, Gary Moss, who then noticed that it occurred at a time when plaintiff was not allowed to leave the facility without authorization. Moss immediately suspended plaintiff. He later verified the time of the incident and talked with his own supervisor Jim Zahn. Moss and Zahn, along with Charles Walker of defendant's Human Resources Department, then decided to terminate plaintiff's employment. Plaintiff was informed of his termination on October 23, 2001.

At the time of plaintiff's termination, he was covered by a collective bargaining agreement and was a member of the International Association of Machinists and Aerospace Workers (the Union). As will be discussed later in more detail, this collective bargaining agreement set out the terms and conditions of plaintiff's employment, including those regarding termination. When plaintiff learned of his termination, he and the Union immediately filed a grievance asking that he be reinstated. This grievance was denied by defendant at the second and third steps of the disciplinary process. However, at the third step, defendant did offer to allow plaintiff to return to work with the same position, pay, and benefits if

---

[1] Defendant has placed into evidence a form which plaintiff initialed indicating that he received a handbook at the start of his employment with defendant. Plaintiff has not explained the discrepancy of this fact with his testimony.

he signed a "last chance" agreement. Plaintiff refused and the termination remained in effect. When the Union declined to take plaintiff's grievance to arbitration, plaintiff filed this lawsuit.

Plaintiff's Claims

Plaintiff's suit, which was originally filed in state court and removed to this Court by defendant on the basis of diversity jurisdiction, states only a single claim for wrongful discharge in violation of public policy under state law. Plaintiff raises this claim by making the allegation that his discharge was racially motivated.[2] It was less than clear from simply reading plaintiff's complaint whether it also raised further state law claims such as hostile work environment, retaliation, or general disparate treatment in violation of public policy. However, plaintiff states in his response to defendant's motion for summary judgment that he is not pursuing claims for hostile work environment, retaliation, or general disparate treatment. He only included allegations which might seem to support such claims in order to show that a general racially hostile atmosphere existed in defendant's Cabarrus facility and that this environment ultimately resulted in his termination because of his race. Therefore, plaintiff has affirmatively stated that he is pursuing only the single wrongful discharge claim. However, as will be seen, none of these claims would fare any better than his claim of wrongful discharge. Defendant has moved for summary judgment as to that claim.

Summary Judgment Standards

Summary judgment should be granted only "if the pleadings, depositions, answers to interrogatories, and admissions

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[2] Although the Court need not reach the merits of the controversy, the crux of plaintiff's racial discrimination claim appears to be based on the fact that other employees, whites and likely blacks, violated the policy but were not terminated. It appears plaintiff was terminated because he was caught, whereas others, including whites, were not. (P1. Unnumbered Brief. at p. 10).

on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The Court must view the evidence in a light most favorable to the non-moving party. *Pachaly v. City of Lynchburg*, 897 F.2d 723, 725 (4th Cir. 1990). When opposing a properly supported motion for summary judgment, the party cannot rest on conclusory statements, but must provide specific facts, particularly when that party has the burden of proof on an issue. Id. The mere fact that both parties request summary judgment does not necessarily mean that the material facts are undisputed. *World-Wide Rights Ltd. Partnership v. Combe Inc.*, 955 F.2d 242, 244 (4th Cir. 1992). "The summary judgment inquiry thus scrutinizes the plaintiff's case to determine whether the plaintiff has proffered sufficient proof, *in the form of admissible evidence*, that could carry the burden of proof of his claim at trial." *Mitchell v. Data General Corp.*, 12 F.3d 1310, 1316 (4th Cir. 1993) (emphasis added). A mere scintilla of evidence will not suffice. Rather, there must be enough evidence for a jury to render a verdict in favor of the party making a claim. A few isolated facts are not sufficient. *Sibley v. Lutheran Hosp. of Maryland, Inc.*, 871 F.2d 479 (4th Cir. 1989).

Because plaintiff's claim arises under state law, special rules apply. When state law is unclear, the federal court must rule in such a manner as it appears the highest state court would rule if presented with the issue. Where the state's highest court has not decided the particular issue, the federal court should examine the rulings of the lower state courts. Rulings of the lower courts may be considered as persuasive evidence of state law, but they are not binding on the federal court should it be convinced the highest court would rule to the contrary. *Sanderson v. Rice*, 777 F.2d 902, 903 (4th Cir. 1985), *cert. denied*, 475 U.S. 1027, 106 S.Ct. 1226, 89 L.Ed.2d 336 (1986). Furthermore, the federal court must rule on state law as it exists, as opposed to surmising or suggesting an

expansion of state law. *Burris Chemical, Inc. v. USX Corp.*, 10 F.3d 243 (4th Cir. 1993).

Discussion

Defendant's primary argument in support of its motion for summary judgment is that plaintiff's wrongful discharge claim is simply not allowed under North Carolina law. The general rule in North Carolina is that it is an "at will" employment state, meaning that employees can be fired at any time and for any reason (or even no reason) by an employer. *Still v. Lance*, 279 N.C. 254, 182 S.E.2d 403 (1971). However, an exception to the "at will" rule has been allowed where the termination in question violates public policy. *Coman v. Thomas Manufacturing Co., Inc.*, 325 N.C. 172, 175, 381 S.E.2d 445, 447 (1989). Moreover, the North Carolina legislature has explicitly stated that it is the public policy of the State of North Carolina that persons have the right to "obtain and hold employment without discrimination or abridgment on account of race . . . ." N.C. Gen. Stat. § 143-422.2. Therefore, employees who would normally be "at will" employees in North Carolina can maintain an action for wrongful termination on account of their race. *Jackson v. Blue Dolphin Communications of North Carolina, L.L.C.*, 226 F. Supp. 2d 785, 791-92 (W.D.N.C. 2002). It is this type of claim that plaintiff wishes to pursue in this case.

Unfortunately for plaintiff, the availability of a cause of action under North Carolina law for wrongful termination has been limited by its courts to include only "at will" employees. *Trexler v. Norfolk Southern Railway Co.*, 145 N.C. App. 466, 470, 550 S.E.2d 540, 542 (2001). Employees terminated under a contract or collective bargaining agreement who can be terminated only for "just cause" must file suit for breach of contract, rather than pursue a tort action based on wrongful termination. *Id.; Freeman v. Duke Power Co.*, Nos. 1:00CV 00665 and 1:02CV00630, 2003 WL 21981291 (M.D.N.C. Aug. 15, 2003) (unpublished). Essentially, a person who is

not an "at will" employee cannot take advantage of an exception to the "at will" rule. Such a person has chosen to have his employment governed by a contract instead. Defendant claims that plaintiff is just such an employee because he was covered by a collective bargaining agreement that specified termination for "just cause."

Plaintiff does not disagree with the correctness of the legal analysis set out above. However, he does contend that it does not apply to him because the collective bargaining agreement does not allow for termination for only "just cause." Alternatively, he argues that plaintiff's termination was also governed by his employee handbook which does not state that termination is allowed only for "just cause." Finally, plaintiff notes that the collective bargaining agreement contains a provision prohibiting discrimination on the basis of race and reasons that the agreement must, therefore, allow the filing of a legal action to enforce this policy.[3]

Plaintiff's argument that the collective bargaining agreement does not require "just cause" in order to terminate an employee is based on Article XXIV of the agreement which states that "Employees may be disciplined or discharged for just cause." Plaintiff believes that, either because the word "may" is used or because the sentence does not exclude the

---

[3] As stated by defendant in its reply brief, it appears that plaintiff's arguments concerning the interpretation of the collective bargaining agreement cause his claim to be preempted under Section 301 of the Labor Management Relations Act. *See Freeman v. Duke Power Co.*, Nos. 1:00CV00665 and 1:02CV00630, 2003 WL 21981291 (M.D.N.C. Aug. 15, 2003) (unpublished), *applying Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 213, 105 S.Ct. 1904, 1912, 85 L.Ed.2d 206 (1985). If so, dismissal of the claim is proper. *Id.* However, because defendant has not fully briefed or argued preemption, the Court will proceed to address plaintiff's interpretation arguments. Additionally, the Court notes that plaintiff has not made any claim that he wishes to, or even could, pursue a cause of action under federal labor law. If anything, his complaint appears aimed at studiously avoiding such claims.

possibility that other standards may be used, this provision does not limit the standard for termination to "just cause." For this reason, plaintiff claims that he is not a person who cannot bring a wrongful termination claim under North Carolina law.

The language relied on by plaintiff does not, on its face, support his argument. That ends the matter. Even assuming, solely for the sake of argument, that the provision relied on by plaintiff is somehow ambiguous as to whether a standard other than "just cause" could be used to terminate a covered employee, plaintiff has produced no evidence, only argument, supporting his interpretation of the language.

He argues that the clause is ambiguous because it does not say that an employee can *only* be discharged for just cause. However, it would make no sense to interpret the language to mean that an employee can be discharged for just cause and also for less than just cause or for more than just cause. Also, defendant shows that both the company and the union interpret the language as requiring a discharge to be for just cause. (Docket No. 15, Ex. P, Cousar Decl. ¶ 2) Nor does the employee handbook alter the contract language. It merely informs an employee who walks off the job that immediate suspension will result and if a violation is proven, termination will follow. In other words, it merely informs the employee that the employer considers walking off the job to be just cause for termination. Moreover, any ambiguity in the contract would require plaintiff to have pursued his contract remedies to secure an interpretation (*see* n.3, *supra*). He may not ask this Court to interpret the contact in this lawsuit.

Defendant, on the other hand, has produced evidence in the form of a declaration and an arbitration decision showing that it and the Union interpret the agreement to require "just cause" for the termination of a covered employee. (Docket No. 15, Ex. P., Cousar Decl. ¶¶ 3-6 & Ex. 1) In light of defendant's evidence and plaintiff's lack of contrary evidence, it is apparent that the collective bargaining agreement

does establish a "just cause" standard for the termination of covered employees.

Not only does the evidence cited by defendant dispose of plaintiff's first argument, but it ends his second one as well. The arbitration opinion provided by defendant pertains to an employee fired for violating one of the items listed on the same page of the employee handbook that sets out plaintiff's alleged violation. In the arbitration decision it is abundantly clear that the case was evaluated using a "just cause" standard. Further, plaintiff himself contested his firing through the grievance process set up by the collective bargaining agreement. He cannot now seriously argue that his termination somehow occurred outside that agreement or under a different standard.

Plaintiff's final argument concerning the anti-discrimination provision in the collective bargaining agreement fares no better. Plaintiff asserts that this provision must allow for some cause of action. It may well be that plaintiff can base a suit on the anti-discrimination provision of the collective bargaining agreement. However, as noted by the court in *Trexler*, this would be an action for breach of contract, not an action for the tort of wrongful termination. The state law contract claim, in turn, would be preempted by federal law. *See Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985); *Freeman, supra*. In the end, it is apparent that plaintiff wished to avoid this result by pleading his complaint in the fashion that he did. However, he cannot succeed in his attempt to avoid the reality that he is not an "at will" employee and so, under the rule set out in *Trexler*, cannot raise a claim for wrongful termination under North Carolina law. As defendant correctly points out, plaintiff needed to bring an action under federal labor law, but has declined to do so. Defendant's motion should be granted. Also, because the case can be decided purely on the basis of defendant's argument that plaintiff has failed to state a proper

claim for relief, no discussion of the merits of his case is necessary.[4]

IT IS THEREFORE RECOMMENDED that defendant's motion for summary judgment (docket no. 12) be granted and that Judgment be entered dismissing this action.

/s/ [Illegible]
United States Magistrate Judge

December 17, 2003

[4] The Court notes that if plaintiff had been found to have stated a claim under state law, the Court would have been unable to decide it on the merits without having plaintiff's counsel first rebrief plaintiff's response to defendant's motion. Although that response contains some cites to the record, many are general cites covering multiple pages. Several span 50 or more pages of deposition testimony and some of those pages do not appear to even be in the record before the Court. Plaintiff filed no exhibits in support of his case and should not have relied on deposition testimony placed in the record by defendant because it contained only portions of the deposition pages cited by plaintiff. In future cases, the Court will expect much more specific cites to the record and will expect that information cited to will be contained in the record.

APPENDIX I

[Logo]

U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Charlotte District Office
129 West Trade Street, Suite 400
Charlotte, NC 28202
(704) 344-6682
TTY (704) 344-6684
FAX (704) 344-6734 & 6731

140A200400

JOSEPH BURCH.

vs.

PHILLIP MORRIS.

INVESTIGATOR'S MEMORANDUM:

12-4-01	CP filed charge. ISA Joyce Stafford took charge only because CP insisted On filing (see log)
12-14-01	CP's charge was issued a no cause
1-10-02	CP wrote a letter to both Enforcement managers requesting that his charge be reopened because the investigation was not thorough.
2-26-02	EEOC receives correspondent from CP via the North Carolina State Office of Administrative Hearings
3-13-02	Charge was reopened by Enforcement Manager Barnett
3-13-02	Reopened charge assigned to Investigator Bill Convey

5-29-02 Charge reassigned to Investigator Victoria Mackey

6-10-02 Investigator Mackey set up date and time for CP to come into Intake for an Interview to see if he had any additional allegations not contained on the original charge that were timely. CP did not make coherent sense during Interview, wanted to file on issues dating back to 1997 and 1998, and refused to believe Investigator Mackey when she told him that he could Only file on allegations occurring 180 days prior to the date he filed his Original charge. Investigator Mackey asked her supervisor James Borden to come into the interview to see if he could reason with the CP. CP argues with Supervisor Borden that he can file on allegations that Occurred in 1997 and 1998 because the EEOC web site says that he can. CP left office, without amending his charge because he wanted to review the EEOC web site.

6-11-02 CP leaves message on Investigator Mackey's phone that he will come into the office on June 14, 2002 with his union representative with him to amend his charge.

6-14-02 CP never showed up nor did he call.

6-18-02 Investigator Mackey sent CP a letter advising him that he had until July 1, 2002 to set up an interview to amend his charge.

6-21-02 CP showed up at office unannounced asking to see the Director. Director Was not in however he saw Enforcement Manager Whitlow. Whitlow advised Investigator Mackey that he spend about three hours with CP Trying to explain to him that he could not file on allegations that occurred In 1997 and 1998. Whitlow stated that he even pulled up EEOC's web site At his desk and walked CP through the information on the web

site showing CP that his interpretation is incorrect. Whitlow stated that he was never really able to completely convince CP that he could only file on Allegations that occurred with 180 days before he filed his charge.

6-15-02 CP sent a letter into office stating that we were wrong and his interpretation of the EEOC web site was correct, that he would not met With anyone else at the office other than the Director.

6-19-02 Supervisor Borden and Investigator Mackey discussed the next action on this charge. Decided to send CP a letter stating everything that we had Attempted to do for him and advising him that if he did not set up an Appointment with me to amend his charge, we were going to consider Him to be uncooperative and issue a second determination.

6-28-02 CP leaves voice mail message on Investigator Mackey's phone that he will Come into office on 7-18-02 to file an amended charge.

7-18-02 CP never shows up at office nor does he call.

This charge needs to be closed for a second time because CP is not cooperative and has not presented any evidence that he has been a victim of discrimination.

Vicki Mackey
Senior Investigator

James M. Borden
July 30, 2003

[Logo]

U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Charlotte District Office
129 West Trade Street, Suite 400
Charlotte, NC 28202
(704) 344-6682
TTY (704) 344-6684
FAX (704) 344-6734 & 6731

140A200400

JOSEPH BURCH,

vs.

PHILLIP MORRIS.

June 18, 2002

Joseph V. Burch
3311 Rillet Court
Charlotte, NC 28269

Dear Mr. Burch:

I received your voice mail message that you left for me last week. I understand that you did not attend our scheduled intake session on June 14, 2002 at 8:30 am because your union steward could not attend. You did not advise James Borden, supervisor, and myself, on June 10, 2002, when we talked with you in Intake, that you wanted your union representative present on June 14, 2002 when we talked with you about the additional allegations you wanted to add to your charge. Please set up an appointment with me on or before July 1, 2002 at a time that is mutually convenient with your union

steward and you. If you and your union steward or you, without your union steward, or not available by July 1, 2002 to amend your charge, the Commission is going to cease processing your charge and issue to you a notice of right to sue. Mr. Borden and I discussed the information that the company submitted to the allegations contained in your charge on June 10, 2002 when we met with you at our office. My telephone number is 704-344-6760.

Sincerely,

Victoria Mackey
Senior Investigator

APPENDIX J

The North Carolina State Bar
Grievance Committee

Henry C. Babb, Jr., Chair
208 Fayetteville St. Mall (27601)
Post Office Box 25908
Raleigh, North Carolina 27611
Telephone (919) 828-4620
Fax: (919) 834-8156
Web: www.ncbar.com

Mr. Joseph V. Burch
3311 Rillet Court
Charlotte, NC 28269

Re: Grievance received against Roger W. Rizk
Our file number: 04G1451

Dear Mr. Burch:

This is to advise that your grievance against the above attorney was considered by the Grievance Committee at its meeting on October 20, 2005. The Committee determined that there was probable cause to believe that the attorney violated the Rules of Professional Conduct. The committee further determined that the attorney should be disciplined by censure. Accordingly, I signed a censure which has been served upon the attorney and is now public in accordance with the rules of the North Carolina State Bar.

A censure is a written form of discipline issued in cases in which an attorney has violated one or more provisions of the Rules of Professional Conduct and has caused significant harm or potential significant harm to a client, the administration of justice, the profession, or a member of the public.

The censure will be placed on the public record of the N.C. State Bar and maintained in the Bar's permanent files. Copies of the censure will be sent to the clerk of the court of the

county in which the attorney maintains an office, and to the clerks of the N.C. Court of Appeals, the N.C. Supreme Court, the U.S. District Courts in North Carolina, the Fourth Circuit Court of Appeals and the U.S. Supreme Court to be placed in their records.

For your information, I enclose a copy of the censure. The North Carolina State Bar appreciates your bringing this matter to its attention.

Very truly yours,

/s/ Henry Babb
HENRY BABB
Chair, Grievance Committee

HB/lr

Enclosure

NORTH CAROLINA
WAKE COUNTY

BEFORE THE
GRIEVANCE COMMITTEE
OF THE
NORTH CAROLINA STATE BAR

04G1451

IN RE: Roger W. Rizk
Attorney At Law

CENSURE

On October 20, 2005, the Grievance Committee of the North Carolina State Bar met and considered the grievances filed against you by J. B.

Pursuant to Section .0113(a) of the Discipline and Disability Rules of the North Carolina State Bar, the Grievance Committee conducted a preliminary hearing. After considering the information available to it, including your response to the letter of notice, the Grievance Committee found probable cause. Probable cause is defined in the rules as "reasonable cause to believe that a member of the North Carolina State Bar is guilty of misconduct justifying disciplinary action."

The rules provide that after a finding of probable cause, the Grievance Committee may determine that the filing of a complaint and a hearing before the Disciplinary Hearing Commission are not warranted and the Grievance Committee may issue various levels of discipline depending upon the misconduct, the actual or potential injury caused, and any aggravating or mitigating factors. The Grievance Committee may issue an admonition, a reprimand, or a censure.

A censure is a written form of discipline more serious than a Reprimand, issued in cases in which an attorney has violated one or more provisions of the Rules of Professional Conduct and has caused significant harm or potential significant harm to a client, the administration of justice, the profession or a member of the public, but the misconduct does not require suspension of the attorney's license.

The Grievance Committee was of the opinion that a hearing before the Disciplinary Hearing Commission is not required in this case and issues this censure to you. As chairman of the Grievance Committee of the North Carolina State bar, it is now my duty to issue this censure. 1 am certain that you will understand fully the spirit in which this duty is performed.

The complainant retained you to represent him in a lawsuit against his former employer Phillip Morris on August 6, 2002. On October 14, 2002, you filed a complaint in the Cabarrus County Superior Court against Phillip Morris on the complainant's behalf. The complainant alleged a single claim for wrongful discharge based on racial motivation in violation of public policy under state law. Phillip Morris' attorney, Wood Lay, had the case removed from state court to federal court. The case proceeded to mediation. Negotiations reached an impasse and Phillip Morris filed a motion for summary judgment.

On December 17, 2003, a federal court magistrate recommended that summary judgment be granted based on the fact that the complainant should have filed suit for breach of contract rather than wrongful termination, as complainant was not an "at-will" employee. The federal court magistrate decided the case on the basis that complainant failed to state a proper claim and deemed that a discussion of the merits was unnecessary. No objections were filed to the magistrate judge's recommendation and it was adopted on January 22, 2004. Phillip Morris was awarded $2,300.05 in costs.

On October 4, 2004, you filed a complaint in Cabarrus County Superior Court alleging Phillip Morris violated the terms of the collective bargaining agreement enforced between Phillip Morris and the complainant. The complaint was based loosely on the complaint filed on October 14, 2002. Attorney Lay wrote you detailing the frivolous nature of the lawsuit given that it was barred by the doctrine of res judicata, that the state law contract claim alleged was preempted by federal law and that the statute of limitations had run under the Labor Management Relations Act.

After receiving Attorney Lay's letter, you wrote the complainant and advised him to withdraw his lawsuit or significant financial sanctions would likely be imposed. You also explained that as of November 18, 2004, your law license would be suspended for failure to timely pay and report various taxes and thus you would no longer be able to assist the complainant. You filed a motion to withdraw on November 9, 2004.

The Grievance Committee found that your conduct in representing the complainant violated several Rules of Professional Conduct. First, the Grievance Committee believes that you violated Rule 1.1 of the Revised Rules of Professional Conduct, as it related to your filing a complaint in state court, rather than federal court in 2002. The EEOC reopened complainant's charge for the second time on July 30, 2002 and issued a right to sue for 90 days. The complainant retained you on August 6, 2002. As of the date that complainant retained you, his right to sue had not yet expired, and the lawsuit should have been filed in federal court.

The Grievance Committee also found that you violated Rule 1.3 of the Revised Rules of Professional Conduct. You did not diligently file the second lawsuit in state court, and the statute of limitations ran on the action. The Grievance Committee found that you delayed filing the action in state

court for 10 months after the magistrate judge's recommendation to adopt summary judgment.

The Grievance Committee also found that you violated Rule 1.4 of the Revised Rules of Professional Conduct. The complainant indicates that you did not notify him of his right to appeal the magistrate judge's summary judgment ruling. You admit that you did not tell the complainant that he could appeal the magistrate judge's ruling. The Grievance Committee held that you should have communicated to complainant that he had a right to appeal the magistrate judge's decision, rather than summarily determining that the complainant would be better served by filing a second lawsuit.

In deciding to issue a censure, the Grievance Committee considered as an aggravating factor that you had an extensive prior discipline record.

You are hereby censured by the North Carolina State Bar for your violation of the Rules of Professional Conduct. The Grievance Committee trusts that you will ponder this censure, recognize the error that you have made, and that you will never again allow yourself to depart from adherence to the high ethical standards of the legal profession. This censure should serve as a strong reminder and inducement for you to weigh carefully in the future your responsibility to the public, your clients, your fellow attorneys and the courts, to the end that you demean yourself as a respected member of the legal profession whose conduct may be relied upon without question.

In accordance with the policy adopted October 15, 1981 by the Council of the North Carolina State Bar regarding the taxing of the administrative and investigative costs to any attorney issued a censure by the Grievance Committee, the costs of this action in the amount of $50.00 are hereby taxed to you.

Done and ordered, this the 28th day of November, 2005.

/s/ Henry Babb
HENRY BABB, Chair
Grievance Committee